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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 108–125) is reported at 291 F. 2d 586. The court's order on petition for rehearing (R. 127–129) is reported at 291 F. 2d 597.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1961 (R. 126). A petition for rehearing was denied on May 19, 1961 (R. 129). The petition for a writ of certiorari was filed on June 19, 1961, and granted on October 9, 1961, 368 U.S. 816. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of forgery in fraud of the United States was supported by the evidence.

2. Whether petitioner's conduct constituted forgery within the reach of 18 U.S.C. 495, punishing frauds against the United States.

STATUTE INVOLVED

Section 495 of Title 18 U.S.C. provides as follows:

> Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner, an accountant, was charged by an indictment in thirty-five counts with offenses arising

out of his preparation of federal income tax returns for various persons (R. 1–16). Taken as a whole, the indictment charged petitioner (in the words of the court below, R. 108–09) with having pursued

> a steady plan of falsifying his clients' returns by adding income tax deductions not incurred or claimed by them to their returns after they had signed them, requesting a refund from the government in the clients' names, and pocketing the same, allegedly by forging a client's name, *i.e.*, cashing the government checks by endorsing the checks as trustee for the payees, which he was not, either in fact or law.

After a jury trial in the United States District Court for the Southern District of California, he was convicted on counts 4 to 34, inclusive, and acquitted on the remaining counts (R. 21–22). Consecutive sentences of one year on each count were imposed, together with a fine of $5,000 on counts 4 through 11 and 23 through 34 (R. 24–26).

On appeal, the court below found that there was "more than sufficient evidence" to support petitioner's conviction on each count, "if all such evidence were properly admissible" (R. 109). However, the court concluded that the evidence used by the government in support of the convictions on all counts except 21 and 22 had been obtained by an invalid search (R. 116–25). It therefore reversed as to all but those two counts and remanded the proceeding for a new trial. After separately examining the evidence supporting the convictions under counts 21 and 22, it found that "there is beyond question substantial evidence to support" petitioner's convictions under them (R. 115–

116) and affirmed as to those two counts (R. 125). It also denied a petition for rehearing directed to the convictions under those two counts (R. 127–29).

Count 21 of the indictment charged that on or about June 2, 1958, petitioner had "knowingly and wilfully forged" on a United States Treasury check in the amount of $848.11 the endorsement of the payees, Daniel H. and Charline[1] R. Bartfield "for the purpose of obtaining and receiving said amount from the United States, its officers and agents" (R. 11). Count 22 charged that on the same date petitioner had "knowingly and wilfully forged" another such check payable to the same payees, in the amount of $556.04, for the same purpose (*ibid.*). The evidence pertaining to these two counts may be summarized as follows:

Mr. Bartfield testified that petitioner, R. Milo Gilbert, had assisted him and his wife in making out their federal income tax returns for 1955 and 1956 (R. 41–42; Gov. Exs. 33, 34, R. 89–103). The record contained an "Application for Tentative Carryback Adjustment" relating to those two years, which had been prepared by petitioner, and which showed the taxpayers' address as being "c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California" (R. 95–96). Mr. Bartfield testified that he had never authorized petitioner to use such an address as his home address

[1] The check involved in count 22 was erroneously made out to Daniel H. & "Chairene" R. Bartfield (R. 87), and this typographical error was carried over into both counts of the indictment (R. 11). The check involved in count 21 was made out to Daniel H. & "Charlene" R. Bartfield (R. 83).

and that he had never authorized petitioner to have any tax refund checks made payable to Bartfield and sent to petitioner (R. 42). Mrs. Bartfield testified that she had never authorized petitioner to receive any tax refund checks made payable to her (R. 47).

The record reflected that carryback adjustments to the Bartfields' returns were allowed by the Internal Revenue Service (R. 91, 95–96) and that two United States Treasury checks marked "Tax Refund" were issued (R. 83, 87). These checks, on which counts 21 and 22 are based, were made out in the following form (R. 83, 87):

> DANIEL H & CHARLENE [2] R BARTFIELD
> % R MILO [3] GILBERT
> 519 TAFT BUILDING
> HOLLYWOOD 28 CALIF

Petitioner placed the following handwritten endorsement on both checks (R. 42–43, 83, 87):

> Daniel H. Bartfield
> Charline R. Bartfield
> R. Milo Gilbert, Trustee

Mr. Bartfield testified that he had never authorized petitioner to sign his name or to endorse his name on these checks (R. 43). He further testified that petitioner had never been his trustee, that petitioner had never been appointed as such in any legal proceedings, and that he had never stated to anyone that petitioner was his trustee (*ibid.*). Mrs. Bartfield testified that she had never authorized petitioner to sign these

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[2] See note 1, *supra*.

[3] On the check involved in count 22, the name "Milo" was incorrectly rendered as "Mile" (R. 87).

checks or any other checks (R. 47). She also testified that petitioner had never been her trustee, that he had never been appointed as such in any legal proceeding, and that she had never stated to anyone that he was her trustee (*ibid.*).

Mr. Bartfield testified that the first time he ever saw the two tax refund checks on which counts 21 and 22 are based was when "the Government men" brought them to his home and showed them to him (R. 43).

On cross-examination of Mr. and Mrs. Bartfield, the defense produced what purported to be a power of attorney executed by them in favor of petitioner (Def. Ex. M, R. 105–07).[4] This document was a printed "Power of Attorney" form bearing what appeared to be the signatures of Daniel H. Bartfield and Charline R. Bartfield, dated April 10, 1957, and appointing R. Milo Gilbert as their "true and lawful attorney" for certain purposes that were set forth in hand printing:

> For all matters pertaining to our Federal and California State Income Taxes and Tax Returns for the calendar years 1954 to 1957 inclusive. This includes the filing and signing of tax returns and all other necessary forms, such as extension of time, etc.; and the filing of necessary refund claims; and the receiving, depositing, endorsing[5] and otherwise negoti-

[4] A photostatic copy of this exhibit appears as an Appendix to this brief, p. 1a, *infra*. Only a printed transcription appears in the Transcript of Record before this Court.

[5] This word was inserted between the lines over a caret. See Appendix, p. 1a, *infra*. Petitioner testified that he made this insertion at the same time he drafted the rest of the document (R. 60).

> ating such refund checks at his sole discretion, including the right of offset. Furthermore, to make any compromises and settlements at his sole discretion, as he see fit and proper. Furthermore, to perform any further act as he may deem necessary under the circumstances.
>
> We further agree to hold said R. Milo Gilbert harmless for any and all acts committed.

The document also bore a certification that Mr. and Mrs. Bartfield had appeared before one Ruth Gilbert, a notary public whom the record showed to have been petitioner's wife (R. 60), and acknowledged that they had executed the power of attorney.

Mr. Bartfield testified that the first signature on the power of attorney appeared to be and probably was his signature, but that he could not remember petitioner's ever having asked him to sign a power of attorney and that he could not remember having signed it (R. 43–45). He testified that, while he knew Mrs. Gilbert, he had never appeared before her to acknowledge signing a power of attorney (R. 46, 45). Mrs. Bartfield testified that the second signature on the power of attorney appeared to be and probably was her signature,[6] but that petitioner had never asked her to sign a power of attorney (R. 48, 49). She testified that she had never met Mrs. Gilbert and had never appeared before her (R. 48–49).

Petitioner testified that he followed a general practice of requiring that his clients sign powers of attorney authorizing him to negotiate any refund checks (R. 54). He stated that his purpose in doing so was

[6] Mr. Bartfield also testified that the second signature looked like his wife's signature (R. 44).

to enable him to deposit the checks in his "trustee account" in the bank (*ibid.*). He testified that, when a refund check would come in, he would "call the client and tell him that I had received it—well, maybe not at this time * * *." (R. 55.) He would then deposit the check in a trustee account (*ibid.*). Petitioner stated that it was his usual practice not to disburse these funds until December, because he wanted to guard against the possibility that the client would spend the money and then not have it, if it should become necessary to return some of it to the government (R. 56). He testified that he customarily explained this procedure to his clients when he prepared their returns and told them that, unless they agreed to have refund checks come to his office, he did not want to handle their cases (R. 55). Petitioner indicated that his reason for having refund checks come to his office was that his fees were charged on "a contingency basis" (R. 56).

The trial court denied petitioner's motion for a directed verdict, stating that the statute under which he was being tried, 18 U.S.C. 495, "is very broad" (R. 62, 66). The court also refused to give instructions requested by the defense to the effect (*inter alia*) that one who, without authority, "executes an instrument purporting on its face to be executed by him as agent of a principal named therein" is not guilty of forgery, and that a check endorsed "name of payee by other as trustee" does not constitute a forged instrument (R. 20, 66). The jury found petitioner guilty on counts 21 and 22 (R. 21–22). In affirming petitioner's conviction on those two counts,

the court of appeals held that the evidence as to whether the Bartfields had authorized petitioner to endorse their refund checks presented an issue of credibility for determination by the jury (R. 116), that the jury's verdict on those counts was supported by substantial evidence (*ibid.*), and that petitioner's signature in a trustee capacity not possessed by him was the signature of a fictitious person and therefore a forgery (R. 115).

SUMMARY OF ARGUMENT

1. Petitioner, who was indicted and convicted of forging endorsements on two United States Treasury checks in violation of 18 U.S.C. 495, admitted that he had made the endorsements. The evidence as to the only contested issue of fact, whether he was authorized to endorse the payees' names on the checks, was in conflict, and the question was properly submitted to the jury. The jury's determination of that issue was amply supported by the evidence, and the evidence also supported the jury's inference that petitioner's conduct was knowing, wilful, and with a purpose to obtain money from the government. Accordingly, he was properly found guilty of forgery in fraud of the government in violation of 18 U.S.C. 495.

2. Petitioner contends that, even if he was without authority to endorse the checks, his conduct did not constitute "forgery" because the endorsements disclosed on their face that he had made them in a representative capacity. However, an examination of the endorsements establishes that they do not in any

sense indicate that petitioner signed them as the payees' agent. While it was assumed in the court below and in this Court upon the petition for a writ of certiorari that the endorsements did contain the word "by," which might suggest an agency relationship, it is now clear that no such word is present. There is thus no factual basis for petitioner's theory, and the conviction should be affirmed.

Even if petitioner's endorsement did import an agency relationship, he is guilty of forgery against the government in violation of 18 U.S.C. 495. That statute was enacted, not as a federal forgery law, but for the purpose of protecting the government against all forms of fraudulent writings. Its context, history and manifest purpose dictate that the forgery it proscribes should be broadly construed to comprehend unauthorized writings even where they purport to be authorized. The general case law supporting a narrower construction has no application to this federal legislation for the protection of the national government.

The court of appeals affirmed on the alternative theory that petitioner's placing his own signature on the checks as "Trustee" was a forgery because it was the signature of a fictitious person. Petitioner was not and had never been the payees' trustee. His assumption of a legal status he did not possess was just as much a forgery as his assumption of a name he did not possess would have been. His conviction on this alternative theory was therefore properly affirmed by the court below.

ARGUMENT

Petitioner was convicted of forgery in violation of 18 U.S.C. 495, for having endorsed two government checks with the names of the payees, followed by his own name and the word "Trustee." We show in our first point that the only contested question of fact—whether petitioner was authorized to endorse the payees' names on the checks—was properly submitted to and determined by the jury. However, petitioner contends that, even if he was not actually authorized to make the endorsements, his conduct did not constitute forgery, because the endorsements disclosed on their face that petitioner had signed the payees' names in a representative capacity. In our second point, we show that the endorsements did *not* import any agency relationship between petitioner and the payees (for which reason the primary basis for this Court's granting certiorari may have disappeared); and that, even if they did disclose such a relationship on their face, they fell within the purview of 18 U.S.C. 495.[7]

I. THE EVIDENCE SUPPORTS THE JURY'S CONCLUSION THAT PETITIONER WAS WITHOUT AUTHORITY TO ENDORSE THE CHECKS

Petitioner conceded that he had himself endorsed the signatures of Daniel H. Bartfield and Charline R. Bartfield, the payees of the United States Treasury checks involved in this case, on the backs of the

[7] We also show that the "Trustee" endorsement was a forgery in that it was the signature of a fictitious person.

checks (R. 42–43).[8] With this crucial issue thus disposed of, the only contested question of fact standing between petitioner and a conviction for forgery in violation of 18 U.S.C. 495 was whether he had been authorized to make those endorsements. The evidence on this issue was in sharp conflict.

The payees, Mr. and Mrs. Bartfield, stoutly denied that they had ever authorized petitioner either to receive or to endorse their names on tax refund checks (R. 42, 43, 47). Petitioner introduced into evidence what purported to be a power of attorney signed by Mr. and Mrs. Bartfield authorizing petitioner to take various actions in connection with their federal income tax returns, including "receiving, depositing, endorsing and otherwise negotiating" refund checks (R. 105–07; Appendix, p. 1a, *infra*). The face of the document disclosed that the word "endorsing" had been inserted between the lines,[9] and the document bore a certification that Mr. and Mrs. Bartfield had appeared before petitioner's wife and acknowledged that they had executed the power of attorney (*ibid.*). However, although conceding that the signatures on the power of attorney were probably theirs, the Bartfields denied that petitioner had ever asked them to sign a power of attorney and could not remember having signed such a document (R. 43–45, 48, 49). Moreover, they flatly denied ever having appeared

[8] Nor does petitioner question that the forgery of an endorsement on a government check violates 18 U.S.C. 495. *Prussian* v. *United States*, 282 U.S. 675; *Conklin* v. *Cozart*, 158 F. 2d 676 (C.A. 5), certiorari denied, 332 U.S. 801.

[9] This insertion was not initialed (see Appendix, p. 1a, *infra*).

before petitioner's wife to acknowledge having signed a power of attorney (R. 45, 48–49).[10] Although petitioner testified that it was his general practice to have his clients execute a power of attorney authorizing him to deal with refund checks (R. 54), he did not testify specifically concerning the Bartfield power except to state that he inserted the word "endorsing" at the time he prepared the rest of the power (R. 59–60).

As the court below observed, this evidence "presents a question of credibility" (R. 116) that was correctly submitted to the jury. It was presented to them with proper instructions on the law relating to authority and agency (R. 75). The jury determined that petitioner was without authority to endorse Mr. and Mrs. Bartfield's names on the government checks and was therefore guilty of forgery (R. 21–22). It was plainly within the province of the jury so to conclude.

Weighing the conflicting testimony, the jury was entitled to infer, in view of the Bartfields' inability to remember ever signing or even discussing a power of attorney, that petitioner submitted the power to the Bartfields under the guise of another document.[11] Or the jury might justifiably have inferred that petitioner induced the Bartfields to execute the power in

[10] Mr. Bartfield testified that he knew petitioner's wife (R. 46), but Mrs. Bartfield denied ever having even met her (R. 49).

[11] The record does not negate the possibility that the power of attorney was a forgery, although there is no affirmative evidence to that effect.

blank, or that he added the authority to "endorse" after they had signed it. Moreover, while the absence of an acknowledgment would not legally invalidate a power of attorney, the Bartfields' unequivocal challenge to the truthfulness of the acknowledgment appearing on the power cast over the entire document a cloud that the jury was entitled to take into account in appraising its authenticity. The jury was under no obligation to accept any part of petitioner's version of the contested facts.[12]

The evidence supported the jury's resolution of the other elements of the offense for which petitioner was indicted—that the forgery of these two government checks was knowing and wilful and that it was done for the purpose of obtaining money from the United States. The jury could properly infer the requisite state of mind and purpose, not only from the circumstances of the unauthorized endorsement, but from petitioner's having had the refund checks sent

[12] Since the issue of authority was for the jury and was properly submitted to them, the court of appeals' characterization of the evidence on the subject (R. 116, as amended on rehearing, R. 127; discussed at Pet. Br., p. 18) has no significance other than as holding that there was "no adequate or convincing proof" of authority such as to require the court to upset the jury's verdict.

Petitioner also points out (Pet. Br., pp. 18–19) that the court below, in its order on rehearing, referred to "the fraudulent returns which were the basis of the refunds" (R. 128). Petitioner is correct in observing that, although the indictment charged fraud with respect to other counts (see Pet. Br., p. 8), there was no charge or evidence that the Bartfield returns were fraudulent. However, the court's remark on rehearing was unnecessary to its decision, since the authority issue was properly submitted to and decided by the jury.

to him without the Bartfields' authority or apparent knowledge (R. 42, 47), and from his having concealed from the Bartfields their receipt, endorsement and deposit in his own account so that they did not know of the checks until shown them by government agents (R. 43). In short, this case was properly submitted to the jury, and the jury's determination of petitioner's guilt was, as the court of appeals found (R. 116) and reaffirmed on rehearing (R. 128), "beyond question" supported by "substantial evidence."

II. PETITIONER'S CONDUCT CONSTITUTES "FORGERY" IN VIOLATION OF 18 U.S.C. 495

Petitioner's primary contention in this Court is that, even if his lack of authority to endorse these government checks be conceded, his signing the payees' names did not constitute "forgery." The ground for this contention is that each of his endorsements allegedly disclosed on its face that petitioner was endorsing the check in a representative capacity and that, under the prevailing law, such an endorsement does not constitute a forgery even though the signer does not in fact have the authority claimed. The short answer to this contention is that, although it had some colorable basis on the factual assumptions entertained in the court below and upon the petition for a writ of certiorari, it is now clear that in fact the endorsements disclosed no agency relationship on their face. Moreover, the reach of the forgery provision of 18 U.S.C. 495 is sufficiently broad to reach wilful misrepresentations of authority to sign other people's names.

A. THE ENDORSEMENTS DID NOT DISCLOSE AN AGENCY RELATIONSHIP ON THEIR FACE

Petitioner admittedly endorsed the two government checks at issue by signing, on separate lines, the name of each of the payees and then his own name, followed by the word "Trustee," thus (R. 42–43, 83, 87):

Daniel H. Bartfield
Charline R. Bartfield
R. Milo Gilbert, Trustee

The handwriting of these signatures was not such as to compel the conclusion that they had all been written in the same hand. It seems perfectly apparent that there is nothing about these signatures that would indicate, either as a matter of law or as a matter of fact, that one person signed for the other two in a representative capacity.

The most likely conclusion that a person viewing such an endorsement would draw is that the Bartfields, who were the only true payees named on the face of the checks, had endorsed and turned them over to petitioner, and that petitioner had in turn made his endorsement preliminary to depositing them, adding the word "Trustee" to indicate in which of his bank accounts he wished to have the checks deposited.[13] Indeed, petitioner has admitted that the *only* purpose the addition of the word "Trustee" was

[13] This hypothesis is not altered by the fact that petitioner's name appears as a part of the payees' address on the obverse side of the check. That fact might suggest to the viewer that some sort of agency relationship actually existed between petitioner and the Bartfields, but it would in no way suggest that petitioner *had signed the Bartfields' names* in a representative capacity.

intended to serve was *not* to indicate an agency relationship but "to facilitate the bank clerks in determining into which account to deposit the check" (Pet., p. 10, n. 7; R. 63; see also Pet. Br. p. 20, n. 13; R. 54). Under the circumstances, it is difficult to see how petitioner can now seriously contend that his employment of that word transformed the endorsement into one disclosing an agency relationship on its face.

Of course, this case is entirely different from the many cases cited by petitioner in which an agency relationship *was* disclosed on the face of the endorsement. Clearly enough, an endorsement of the payee's name "by" the actual signer—the factual situation erroneously assumed to obtain in this case before the court of appeals and in this Court upon the petition for a writ of certiorari—shows a purported agency relationship on its face. See, *e.g., Selvidge* v. *United States,* 290 F. 2d 894 (C.A. 10) (cited Pet. Br., p. 12). The same would be true of an endorsement in the signer's own name "per pro." the payee. See, *e.g., In re Tully,* 20 Fed. 812 (S.D.N.Y.) (cited Pet. Br., p. 10). Similarly, where the payee or prior endorser is a corporate entity that can act only through agents, the signature of a natural person will import an agency relationship, see, *e.g., Peoples Bank* v. *International Finance Corp.,* 30 F. 2d 46 (C.A. 4) (cited Pet. Br., p. 10); *Torrance Nat'l Bank* v. *Aetna Casualty & Surety Co.,* 251 F. 2d 666 (C.A. 9) (cited Pet. Br., p. 11), even if no title (such as "Cashier" or "Treasurer") is set forth, see, *e.g., Greathouse* v. *United States,* 170 F. 2d 512 (C.A. 4) (cited Pet. Br., p. 11); *Dexter Horton Nat'l Bank*

v. *United States F. & G. Co.*, 149 Wash. 343, 270 Pac. 799 (cited Pet. Br., pp. 16–17 and n. 10).

But those cases are not this case. The endorsement petitioner placed on the government checks simply cannot be read as importing any agency relationship, nor (as petitioner has conceded) was it intended to do so. It is true, of course, that in the court below both petitioner and the government erroneously assumed that the checks were endorsed with the payees' signature "*by* R. Milo Gilbert, Trustee," and the court below labored under the same misapprehension (see R. 115). Similarly, in this Court upon the petition for a writ of certiorari, both the petitioner and the government mistakenly assumed that the endorsement contained the word "by" (Pet., p. 4; Gov. Br. Opp., p. 3); presumably it was upon this assumption that the Court granted the writ.

The facts are now known to be otherwise.[14] Petitioner concedes (as the checks themselves plainly disclose, R. 83, 87) that the word "by" does *not* appear in the endorsement (Pet. Br., p. 5). There is no basis for assuming that the trial court or the jury was under any misapprehension on this score; they had the actual checks before them and could see for themselves how the endorsement read (see R. 42–43, 47;

[14] It appears that the original checks were mislaid some time after the trial. Their absence from the record was not noticed (largely because the precise language of the endorsement was not critical under the theory on which the court of appeals based its decision) until called to the parties' attention by the Clerk of this Court after the writ was granted.

Pet. Br., p. 5, n. 4).[15] And, of course, the fact that the court of appeals considered and decided the case on the basis of a factual assumption *less* favorable to the government than the true facts would not justify ignoring the true facts;[16] plainly enough the court below would regard the case in its true factual posture as an *a fortiori* case.[17]

And yet the petitioner continues to present this case to the Court as if the word "by" were (*e.g.*, Pet. Br., p. 3) or might be (*e.g.*, Pet. Br., pp. 7, 20) in the endorsement, or as if it made no difference one way or the other (*e.g.*, Pet. Br., p. 5, n. 4). As we show below, the presence or absence of the word "by" in the endorsement does *not* make any difference, although not for the reason petitioner suggests, but because the crime of forgery against the government under 18 U.S.C. 495 embraces misrepresentations as to authority as well as spurious signatures. But under petitioner's theory (expounded at Pet. Br., pp. 9–17)—that endorsements showing on their face that they were made by the signer in an alleged representative capacity do not constitute forgery—the absence

[15] Petitioner's suggestion (Pet. Br., p. 5, n. 4) that the trial judge was under a misapprehension is without foundation. The judge's references to an endorsement containing the word "by" were not related to counts 21 and 22 and are explained by the fact that there were other counts involving checks whose endorsement *did* contain the word "by."

[16] Had the court reversed the judgment, an erroneous concession of the facts might have been binding upon the government, but such was not the case.

[17] The same would be true with respect to the trial court if (as has not been shown to be the case) it had been mistaken concerning the form of the endorsement on the checks involved in counts 21 and 22. See note 15, *supra*.

of the word "by" is critical. Without it, the endorsements of the payees' names are robbed of the slightest pretense that they were made by petitioner in a representative capacity. Accordingly, petitioner's convictions under counts 21 and 22 can properly be affirmed without any consideration of the full reach of 18 U.S.C. 495.

B. EVEN IF THE ENDORSEMENTS DISCLOSED AN AGENCY RELATIONSHIP, THEY CONSTITUTED FORGERY UNDER 18 U.S.C. 495

The theory on which the trial court submitted this case to the jury made it unnecessary for the court to determine (or to ask the jury to determine) whether the endorsements petitioner placed on the government checks disclosed an agency relationship on their face. The court found that the statute punishing forgeries practiced on the government, 18 U.S.C. 495, "is very broad" (R. 62)—indeed, "one of the broadest statutes," and necessarily so because of the difficulties the government encounters in protecting itself against forgeries of the great volume of checks it must issue (R. 63). Accordingly, the court concluded that an endorsement disclosing any agency relationship on its face (as, for example, through the word "by," R. 63, 64) would be a forgery under this statute if it were not in fact authorized by the payee (R. 66). In view of the history and manifest purpose of 18 U.S.C. 495, that conclusion was clearly correct. Since the jury found petitioner to have been without authority to endorse the Bartfields' signatures on the government checks at issue here, his conviction should be affirmed even if those endorsements be viewed (as we contend they cannot be) as openly and plainly

implying that he was acting in a representative capacity.

In pertinent part, 18 U.S.C. 495, under which petitioner was indicted and convicted for having "knowingly and wilfully forged" an endorsement on a United States Treasury check "for the purpose of obtaining and receiving" money "from the United States, its officers and agents,"[18] provides that

> Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money * * *

is guilty of a felony. Two succeeding paragraphs of Section 495 punish the uttering or publishing of any such writing as true, and the transmission or presentation of any such writing to the government with intent to defraud it.[19] The statute thus deals in the broadest and most comprehensive terms with all forms of frauds that might be perpetrated upon the federal government by means of writings.

That the statute was enacted, not simply as a federal forgery statute, but for the primary purpose of protecting the government against frauds by writing is apparent, not only from its context and comprehensiveness, but from what little of its history is

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[18] Counts 21 and 22 disclosed on their face that they were brought under 18 U.S.C. 495 (R. 11).

[19] See p. 2, *supra*.

known. The statute was originally enacted in 1823. Its first section provided (3 Stat. 771)

> That if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited; or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum or sums of money * * * every such person shall be deemed and adjudged guilty of felony * * *.

Thus, while unnecessarily detailed by modern standards, that Act spoke just as broadly when first enacted as it does today. As in its present form, this section also punished the uttering or publishing and transmission or presentation of such writings. A second section punished knowing possession of such writings[20] and contained the proviso "That nothing herein contained shall be construed to deprive the courts of the several states of jurisdiction, under the laws thereof, over offences declared punishable by this law."

While no debates or reports on the bill were published, its character is apparent from its title as enacted, "An Act for the punishment of frauds com-

[20] This provision was subsequently eliminated as an unnecessary duplication of the preceding section. See 42 Cong. Rec. 730.

mitted on the government of the United States" (see 3 Stat. 771), which remained substantially the same throughout the various stages of its consideration. 40 Annals of Congress 188, 200, 290, 320, 1015, 1144, 1146, 1157, 1161 (1823). Moreover, that its central purpose was not to make forgery and similar conduct federal offenses but rather to protect the federal government against frauds is underlined by the proviso to the second section, which emphasizes that, to the extent that the proscribed crimes against the government are also offenses under the ordinary criminal laws of the states, they may be punished by the latter as well.

From the foregoing, it seems fair to infer that the Congress which passed this statute would have intended that the "forgery in fraud of the government" proscribed by it should be broadly construed. It would have been expected that the offense would be measured in relation to the manifest legislative purpose of fully and effectively protecting the federal government against all forms of fraud by writing, cf. *United States* v. *Turner*, 7 Pet. 132, 136 (1832), not simply to a purpose of enforcing the ordinary forgery laws, which it left to the states.

That the Congress which enacted the progenitor of 18 U.S.C. 495 must have intended "forgery" in violation of its terms to be broadly construed is further evidenced by the fact that the concept of forgery had a very broad meaning in the early nineteenth century when this statute was enacted. While no American authorities have been found that cast any light on the subject, the English writers without ex-

ception defined "forgery" as comprehending any alteration of a writing, for fraudulent purposes, that gives an appearance of truth to a falsity. Thus, Lord East, who wrote the most extensively on this subject of any writer of that time, 2 East, *Pleas of the Crown* 852 (1803), said:

> *Forgery* at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit. This definition results from all the authorities ancient and modern taken together. * * *

See also, *e.g.*, 1 Hawkins, P.C., ch. 70, Sec. 2; 3 Coke, Inst. 169; 4 Blackstone, Comm. 247.

What appears to have been the first authoritative construction of the progenitor of 18 U.S.C. 495 confirms the view that "forgery" within its terms was intended to be broadly construed. In 1839, the court in *United States* v. *Osgood*, 27 Fed. Cas. No. 15,971a at p. 363 (C.C.S.D.N.Y.), defined "forgery" as

> the false making of a paper. This false making need not be the entire fabrication of the paper; any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different importance and meaning, is a forgery; and if this change is made for the purpose of defrauding the government, it is a felony, the crime interdicted by the statute. * * *

It seems quite clear that petitioner's conduct would fall within either this definition or those of the contemporaneous English writers.[21] For even if his en-

dorsement be considered as containing an implicit claim of authority to sign the payees' names to these government checks, that claim was, as the jury found, false and fraudulent, an attempt to give an appearance of truth to what was a fabrication (*i.e.*, that he had authority).

The Act of 1823 has come down to us virtually unchanged, and none of the changes[22] has modified its central purpose of punishing frauds against the government. It is true that, while the Revised Statutes of 1873–74 placed this provision (Section 5421) in Chapter 5, "Crimes Against the Operations Of The Government," and the Criminal Code of 1909 placed it (Section 29, 35 Stat. 1094) under a similar heading, the present Criminal Code places it in Chapter 25, "Counterfeiting and Forgery." However, no change in the substance of the legislation was thereby intended, see 42 Cong. Rec. 858; see also *id.* at 655–66, 730, and superficial changes in the arrangement of a statute do not change or limit its originally intended scope.

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[21] This Court first construed the progenitor of 18 U.S.C. 495 in *United States* v. *Staats*, 8 How. 41 (1850). The Court there held that the third clause, punishing the transmission and presentation of fraudulent writings, comprehended a false affidavit attached to a claim against the government. In dictum, the Court suggested that such a broad construction "probably" would not be applicable to the first clause, punishing the actual making of fraudulent writings, 8 How. at 46. There does not seem to be any basis for such a distinction, nor is there any reason to suppose that even the Court's "narrower" construction of the first clause would not comprehend petitioner's conduct.

[22] The word "contract" was later added to the writings specifically named, the penalty clause was modified, and the phraseology of the provision was considerably simplified.

See, *e.g.*, *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379–80.

While the statute punishing forgeries practiced upon the government has not changed since the early nineteenth century, the common law of forgery has been modified. In *Regina* v. *White*, 2 Car. & K. 404 (1847) (cited Pet. Br., p. 10), a restrictive qualification was written into the definition of forgery. There the conviction of a clerk who had endorsed a bill of exchange by writing "Per procuration, Thomas Thomlinson" (his former employer), and then adding his own name, was reversed without discussion. The mischief of this decision was soon recognized, and Parliament passed the Forgery Act of 1861, 24 & 25 Vict., c. 98, sec. 24, which defined forgery to include the act of signing the name of another "per procuration" without authority or excuse and with the intent to defraud.[23] However, the doctrine of *Regina* v. *White* had already taken root in the United States, see, *e.g.*, *In re Tully*, 20 Fed. 812 (S.D.N.Y.) (cited Pet. Br., p. 10), and has flourished despite its having been disowned in the parent country.

Although this restrictive view of "forgery" under the common law and ordinary forgery statutes has become the majority view in this country, a number of courts, particularly federal courts, have wisely refused to follow it. See, *e.g.*, *Ex parte Hibbs*, 26 Fed.

[23] The statute now in effect in England, the Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, sec. 1(2), provides that a document is forged "if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making * * *."

421, 432–34 (D. Ore.); *Yeager* v. *United States*, 32 F. 2d 402 (C.A.D.C.);[24] *United States* v. *Tommasello*, 64 F. Supp. 467 (E.D.N.Y.);[25] *Security Nat'l Bank of Durand* v. *Fidelity & Cas. Co. of New York*, 246 F. 2d 582 (C.A. 7). In *Quick Service Box Co.* v. *St. Paul Mercury Indemnity Co.*, 95 F. 2d 15, 17 (C.A. 7), the court said:

> The essence of forgery does not so much consist in counterfeiting as in endeavoring to give appearance of truth to a mere deceit and falsity * * *. In other words, if the deceit consists in making it appear that a man's own act was done under circumstances which would make it genuine, when in fact it was false and unauthorized, the result is the same. * * *

However, there appears to have been no direct ruling upon the question whether an endorsement purportedly authorized but in fact not authorized would constitute a forgery in violation of 18 U.S.C. 495 prior to the decision of the Court of Appeals for the Tenth Circuit in *Selvidge* v. *United States*, 290 F. 2d 894, in 1961. There, the defendant had endorsed a United States Treasury check with the name of her employer and then added her own name as follows: "By Thelma L. Selvidge." She was convicted of a violation of 18 U.S.C. 495, but the court of appeals reversed, holding that "the unauthorized endorsement did not constitute forgery." 290 F. 2d at 895.

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[24] Especially as explained in *Kenney* v. *North Capitol Savings Bank*, 61 F. 2d 521 (C.A.D.C.).

[25] This case arose under 18 U.S.C. 494, which has been described as a "companion" to 18 U.S.C. 495, such that identical canons of construction are applicable to the two statutes. See *Pina* v. *United States*, 165 F. 2d 890, 894 (C.A. 9).

We respectfully urge that the *Selvidge* case was erroneously decided. The court relied almost entirely upon state forgery cases, see 290 F. 2d at 895–96, n. 1; it assumed that the ordinary forgery involved in those cases was identical with the forgery in fraud of the government punished by 18 U.S.C. 495. It refused to follow the decisions of other federal courts in the *Hibbs, Yeager, Tommasello* and *Quick Service Box* cases, *supra,* see 290 F. 2d at 896 and n. 2. Most important, the court gave no consideration whatsoever to the statute it was construing, nor to its manifest purpose to protect the government against fraudulent writings.

We emphasize once more that there is nothing about the endorsement petitioner placed on the government checks to suggest that he had signed the payees' names in a representative capacity. Hence, neither the *Selvidge* case, *supra,* nor any of the authorities petitioner cites in support of his theory of "forgery" has any application.[26] But even if this case be considered as if a person receiving these checks would somehow be put on notice that petitioner had signed them in an alleged representative capacity, petitioner is guilty of violating 18 U.S.C. 495. The congressional purpose effectively to protect the government against all forms of fraud that might be practiced upon it militates against a narrow and restrictive construction of the "forgery in fraud of the government" condemned by this statute. As the jury found, petitioner, with fraudulent purpose and without author-

[26] See pp. 17–18, *supra.*

ity, endorsed these United States Treasury checks with the payees' names. Such conduct makes out the offense of forgery under 18 U.S.C. 495, properly considered in the light of its history and manifest purpose.

C. THE ENDORSEMENT WAS ALSO A FORGERY BECAUSE IT WAS THAT OF A FICTITIOUS PERSON

Petitioner, after signing the payees' names to these United States Treasury checks without authority, signed "R. Milo Gilbert, Trustee." While petitioner's name was R. Milo Gilbert, there was no such legal person as R. Milo Gilbert, Trustee. The Bartfields denied that petitioner had ever been their trustee, that he had ever been appointed as such, or that they had ever referred to him as such (R. 43, 47). The purported power of attorney from the Bartfields to petitioner did not constitute him a trustee (R. 105–07; Appendix, p. 1a, *infra*), nor did he claim such a status in relation to the Bartfields in his testimony at the trial.

Thus, if petitioner's signing his own name as "Trustee" was anything more than the mere designation of a bank account,[27] it was, as the court below held (R. 115), a false endorsement in violation of 18 U.S.C. 495. The endorsement of a check with the name of a fictitious person constitutes forgery, see *Milton* v. *United States,* 110 F. 2d 556, 560–61 (C.A.D.C.); *Rowley* v. *United States,* 191 F. 2d 949, 951 (C.A. 8). To no less an extent, the assumption of a fictitious legal status is within the mischief to be

[27] And if that is all it was, it clearly cannot be said to import an agency relationship, see pp. 16–17, *supra.*

guarded against by the statute, cf. *United States* v. *Turner*, 7 Pet. 132, 136; *Logan* v. *United States*, 123 Fed. 291 (C.A. 6). One who is in fact a trustee acts as such in a wholly different capacity, and possesses greater powers and rights, than he does as a private individual; he is legally a different person.

Accordingly, one who seeks to defraud the government by claiming to be a legal person (*i.e.*, himself as trustee) who does not exist is just as guilty of forgery against the government as if he had claimed to be a natural person who did not exist. Indeed, the offense would seem to be the greater, for by assuming a fictitious status that carries with it the implication that he has been entrusted with fiduciary responsibilities, the forger greatly enhances his ability to deceive and defraud. The court below was correct in affirming upon this alternative theory that petitioner, by endorsing these checks in a trustee capacity which he did not possess, signed a fictitious name and was thus guilty of forgery against the government in violation of 18 U.S.C. 495.

CONCLUSION

Whatever legal theory is applied to the facts, they show that petitioner, without any authority whatsoever, falsely endorsed United States Treasury checks for the purpose of obtaining money from the government to which he was not entitled. He is thus guilty of forgery in fraud of the government, in violation of 18 U.S.C. 495. The judgment of the court below, sustaining his conviction on these counts, should be affirmed.

Respectfully submitted.

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Attorneys.

MARCH 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962

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Power of Attorney

SPECIAL

KNOW ALL MEN BY THESE PRESENTS: That we, Daniel H Bartfield And Charlene R Bartfield (husband and wife), the undersigned (jointly and severally if more than one), hereby makes, constitutes and appoints R Milo Gilbert his true and lawful attorney for him and in his name, place and stead and for his use and benefit:

(a) For all matters pertaining to our Federal and California State Income Taxes and Tax Returns for the Calendar years 1954 to 1957 inclusive This includes the filing and signing of Tax returns and all other necessary forms, such as extension of time, etc, And the filing of necessary Refund claims, and the Receiving, depositing, endorsing and otherwise negotiating such Refund checks at his sole discretion, including the Right of offset Furthermore, to make any Compromises and settlements at his sole discretion, as he see fit and proper Furthermore to perform any further acts as he may deem necessary under the circumstances

We further agree to hold said R Milo Gilbert harmless for any and all Acts committed.

GIVING AND GRANTING unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite, necessary, or appropriate to be done in and about the premises as fully to all intents and purposes as he might or could do if personally present, hereby ratifying all that his said attorney shall lawfully do or cause to be done by virtue of these presents.

Wherever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

WITNESS his hand this 10th day of April, 19 57

Daniel H Bartfield

x Charlene R Bartfield

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8 pt. type or larger

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS.

On April 10, 1957
before me, the undersigned, a Notary Public in and for said County and State, personally appeared
Daniel H. Bartfield And
Charlene R Bartfield

known to me to be the person S whose name S ARE subscribed to the within instrument and acknowledged that they executed the same.
WITNESS my hand and official seal.

(Seal) Ruth Gilbert
Notary Public in and for said County and State

SPACE BELOW FOR RECORDER'S USE ONLY

RUTH GILBERT
NOTARY PUBLIC IN AND FOR THE COUNTY
OF LOS ANGELES, STATE OF CALIFORNIA
My Commission Expires September 22, 1958.

Title Order No.

Escrow or Loan No.

WHEN RECORDED MAIL TO
R. Milo Gilbert
2747 North Lincoln St.
Burbank, Calif.

POWER OF ATTORNEY — SPECIAL

This standard form cannot meet every problem in the field indicated. Before you sign, read it, fill in all blanks,

1a

APPENDIX